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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956.

No. 395.

MILLARD DEE GRUBBS, - - - - - - Petitioner,

versus

BURRELL H. FARNSLEY,
RAY BOSSMEYER,
BRADY M. STEWART,
PORTER SIMS,
BERT T. COMBS,
JOHN L. KELTY,
LEONARD SLATER,
SLATER & GILROY, INC.,
THOMAS C. MAPOTHER,
ELMER E. MORGAN,
BARRY BINGHAM, and
COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY, - - - - - - - - - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Of Counsel.

October 3, 1956.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

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No. 395.

MILLARD DEE GRUBBS, - - - - - *Petitioner,*

v.

BURRELL H. FARNSLEY,
RAY BOSSMEYER,
BRADY M. STEWART,
PORTER SIMS,
BERT T. COMBS,
JOHN L. KELTY,
LEONARD SLATER,
SLATER & GILROY, INC.,
THOMAS C. MAPOTHER,
ELMER E. MORGAN,
BARRY BINGHAM, AND
COURIER-JOURNAL AND LOUISVILLE TIMES
COMPANY, - - - - - - *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

I.

ORDERS OF COURTS BELOW.

The order of the United States District Court for the Western District of Kentucky, sitting at Louisville,

dismissing petitioner's complaint upon motions of the various respondents to dismiss the complaint for failure to state a claim upon which relief may be granted was entered on July 8, 1955. The opinion appears in 133 F. Supp. 110. (The published report erroneously lists Marshall P. Eldred, Blakey Helm and J. Dudley Inmar, Louisville, Kentucky, as appearing for plaintiff, Millard Dee Grubbs, petitioner herein. Said counsel represent Judges Sims, Stewart, Combs, Bossmeyer and Farnsley and the Deputy Clerk Kelty. Grubbs appeared *pro se*.)

The order of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the District Court was entered on July 11, 1956 (234 F. 2d 666).

II.

JURISDICTION.

The jurisdiction of the United States District Court to hear and determine petitioner's complaint and the motions to dismiss filed thereto is set forth in Title 28, Section 1343, U.S.C.A., and Rule 12, Federal Rules of Civil Procedure.

The jurisdiction of the United States Court of Appeals to review the judgment of the United States District Court is set forth in Title 28, Section 1291, U.S.C.A.

The jurisdiction of the United States Supreme Court to determine whether it will review by writ of certiorari the decision of the United States Court of Appeals is set forth in Title 28, Section 1254, U.S.C.A.

III.

STATUTES INVOLVED.

Title 42, Sections 1983, 1985, 1986, U.S.C.A.; Title 28, Section 144, U.S.C.A.; Section 412.080, Kentucky Revised Statutes; Sections 113, 371 and 444, Kentucky Civil Code of Practice.

IV.

STATEMENT OF FACTS.

As petitioner's complaint was dismissed by the District Court for failure to state a claim upon which relief could be granted, the facts in this case, insofar as testing the sufficiency of the complaint under the motions to dismiss, are to be gathered from the complaint itself. Petitioner's "Statement of Case," appearing on pages 4-7 of his petition for certiorari, comprises quotations from the complaint and petitioner's analysis of the various paragraphs therein. A somewhat broader statement will be helpful to the Court.

Petitioner's alleged cause of action against respondents for damages arising from alleged denial and deprivation of his civil rights grows out of two cases filed in the Jefferson Circuit Court, at Louisville, Kentucky, in one of which petitioner was a defendant and in the other of which he was the plaintiff. Both cases were decided by the Jefferson Circuit Court adversely to petitioner and were thereupon appealed by him to the Court of Appeals of Kentucky, which affirmed both

cases. These cases are *Grubbs* v. *Slater,* Ky., 266 S. W. 2d 85 (1953), and *Grubbs* v. *Slater & Gilroy, Inc.* Ky., 267 S. W. 2d 754 (1954).

At the times referred to in the complaint Slater & Gilroy, Inc., was a Kentucky corporation engaged in the printing business, and Leonard Slater was its president. On May 8, 1950, petitioner executed a five hundred ($500.00) dollar note to the Liberty National Bank and Trust Company, of Louisville, with Leonard Slater as surety thereon. The note not being paid at maturity, suit was instituted by the bank against the maker and surety to recover the amount due on the note.

Grubbs filed an answer, counter-claim, set-off and cross-petition. The bank obtained a judgment against the surety, who thereupon satisfied it. Thereafter an order was entered, by agreement, dismissing the action settled as to the surety on the bank's claim and dismissing without prejudice the claim of Grubbs set out in the answer, counter-claim, set-off and cross-petition.

Thereafter Leonard Slater, as the surety who had satisfied the judgment on the note, gave notice to Grubbs, under Section 412.080, Kentucky Revised Statutes, and Section 444, Kentucky Civil Code of Practice, that he would seek judgment over against his principal. The motion was heard and sustained by the Court. The respondent, Burrell H. Farnsley, was the then Judge of the Jefferson Circuit Court, Second Common Pleas Branch, being the Judge in whose division the case was pending.

Petitioner then appealed to the Court of Appeals of Kentucky, which affirmed the lower court, the opinion being written by respondent, Judge Brady M. Stewart. The petition for rehearing was filed and denied, and a motion for stay of mandate to grant time for petitioner to petition this Court for certiorari was denied by respondent, Porter Sims, then Chief Justice of the Court of Appeals.

The second court action was filed in the Second Chancery Branch of the Jefferson Circuit Court by petitioner against respondent, Slater & Gilroy, Inc., in connection with a contract between said parties relative to the publishing and sale of a book written by petitioner. Various amended petitions were filed and appropriate motions to require petitioner to paragraph his various claims were filed, all of which were sustained by the Chancellor.

Subsequently, petitioner withdrew his pleas for equitable relief and requested the transfer of his action to the Common Pleas Branch of the Jefferson Circuit Court, which motion was sustained. Appropriate motions were then made to require petitioner to reform and paragraph his pleadings. This he refused to do, and the presiding judge of that division, the respondent, Ray Bossmeyer, dismissed his action without prejudice under the provisions of Sections 113 and 371 of the Kentucky Civil Code of Practice.

An appeal was taken to the Court of Appeals, which affirmed the lower court, the opinion being written by the respondent, Bert T. Combs, then one of the judges of the Court of Appeals.

The respondent, John L. Kelty, was at the times referred to in the complaint and is now Deputy Clerk of the Jefferson Circuit Court.

The respondents, Thomas C. Mapother and Elmer E. Morgan, are practicing attorneys of the Louisville Bar and represented respondents, Leonard Slater and Slater & Gilroy, Inc., in the proceedings referred to above.

The respondent, Barry Bingham, is the president and principal stockholder of the respondent Courier-Journal and Louisville Times Company. The latter respondent being the corporate entity publishing the newspapers, the Courier-Journal and the Louisville Times. These respondents were not parties to the litigation in the Kentucky Courts just described and had no official or unofficial connection therewith. They are not charged in petitioner's complaint with having any connection with this litigation and are referred to only in paragraphs 4 and 5 of petitioner's complaint.

Paragraph One of the complaint refers to the judgment obtained against petitioner by respondent, Leonard Slater, in the Jefferson Circuit Court and the appeal therefrom. It alleges that petitioner was denied due process of law and equal protection of law because of falsehood, fraud, suppression of truth, libel and arbitrary exercise of judicial power practiced by "the defendants". Damages in the amount of One Million Five Hundred Thousand ($1,500,000.00) Dollars were prayed against the defendants named therein.

Paragraph Two of the complaint alleges the judgment referred to in the preceding paragraph to be a

nullity and void and a violation of rights secured to petitioner by the United States Constitution. This paragraph of the complaint asks that the respondents, Leonard Slater, Thomas C. Mapother and Elmer E. Morgan, be enjoined from proceeding under the judgment.

Paragraph Three of the complaint refers to the action in the Jefferson Circuit Court filed by petitioner against respondent, Slater & Gilroy, Inc. It asserts that "the defendants" involved in that action, denied petitioner equal protection of the laws by arbitrary exercise of judicial powers and by falsehood and fraud in violation of the United States Constitution. Damages were sought in the amount of One Million Five Hundred Thousand ($1,500,000.00) Dollars.

Paragraph Four of the complaint is alleged to be an alternative cause of action arising under criminal provisions of the Civil Rights Statutes which petitioner alleged to be 18 U. S. C. A., Section 53. In Paragraph Four of the complaint it is alleged that "the defendants" acted in concert to deny petitioner his civil rights in accordance with the pre-existing and continuing conspiracy. It is further alleged that the Courier-Journal and Louisville Times Company was a party to said conspiracy; that the Courier-Journal and The Louisville Times published false and libelous statements against the petitioner, and that "the defendants" and the Courier-Journal and Louisville Times Company and Bingham and others by conspiracy exerted influence in denying, and caused petitioner to be denied, his civil rights. In this same paragraph of the complaint it

is further alleged that the defendant, Kelty, a deputy clerk of the Jefferson Circuit Court, was assigned to the Second Common Pleas Branch of the Jefferson Circuit Court where the litigation referred to in Paragraph One of the complaint was pending, and that said defendant was then "shifted" across the hall to act as a clerk in the First Common Pleas Branch where the action referred to in the Third Paragraph of the complaint was pending. It is further alleged that the defendant, Kelty, exerted strong prejudice against the petitioner by refusing accurately and properly to record rulings made in said actions and by refusing to have the transcript of the record properly prepared for appeal. Damages were prayed in the amount of One Million Five Hundred Thousand ($1,500,000.00) Dollars, as set out in Paragraph One and Paragraph Three.

Paragraph Five of the complaint is alleged to be an alternative action at law for damages for refusal and failure of "the defendants" to prevent the denial of petitioner's civil rights as set out in Paragraphs One, Three and Four of the complaint, contrary to the provision of 8 U. S. C. A., Section 47 (now 42 U. S. C. A., Section 1986). Damages are prayed in the amount of One Million Five Hundred Thousand ($1,500,000.00) Dollars as set out in Paragraph One of the complaint.

The detailed allegations of the Complaint are more fully summarized in the District Court Opinion, 133 F. Supp. 110 at 111 to 115. Subsequently, after motions by the respondents, petitioner filed an amended complaint correcting the almost totally erroneous references in his complaint to the alleged statutory bases for his action.

V.

PROCEEDINGS BELOW.

Petitioner's complaint was filed in the United States District Court for the Western District of Kentucky on June 29, 1954. On July 22, and July 26, 1954 Motions to Dismiss and to Strike were filed on behalf of the various defendants. Argument was had on the various motions in the case on August 6, 1954, September 7, 1954 and September 24, 1954. Briefs were filed with the District Court on the various motions before the Court on September 7, 1954, September 21, 1954, September 27, 1954, October 4, 1954, October 12, 1954 and October 25, 1954. The District Court then took the matter under submission and on July 8, 1955 rendered the comprehensive opinion set out at 133 F. Supp. 110. This opinion sustained the motions of the various defendants and dismissed for petitioner's failure to state a cause of action. On July 16, 1955, petitioner filed a motion to set aside the District Court's judgment and on July 21, 1955, petitioner filed his affidavit and motion to recuse the trial judge for personal bias and prejudice. On July 30 and August 3, 1955, the various defendants filed memoranda and briefs with the District Court and on August 12, 1955, the District Court, at a hearing in open court, overruled the petitioner's motions to recuse and to set aside the judgment. The case was duly appealed to the United States Court of Appeals for the Sixth Circuit. The cause was extensively briefed by all of the parties, and petitioner and counsel for the various respondents

orally argued the case before the Court of Appeals for the Sixth Circuit on June 8, 1956. On June 11, 1956, the Court of Appeals entered its opinion and order affirming the decision of the District Court. This opinion and order is set out in 234 F. 2d at page 666. Subsequently, on September 6, 1956, the petitioner filed his petition for a writ of certiorari with this court. In that petition at pages 13 and 14 petitioner implies that the decision of the United States Court of Appeals for the Sixth Circuit was in some way the result of the bias or prejudice of Judges John D. Martin and Shackleford Miller of that court.

An examination of the procedural record, but partially detailed above, incontrovertably demonstrates the patience, courtesy and consideration extended to petitioner by the district judge and the judges of the United States Court of Appeals for the Sixth Circuit at every stage of these pleadings. The district judge in particular urged upon the petitioner every opportunity to argue and brief his case and to amend his pleadings to cure the deficiencies existing therein. At the conclusion of this truly commendable display of judicial forbearance upon the part of the District Court, in the face of difficult, provocative and aggravating circumstances, the District Court entered its opinion referred to above. The measure of the petitioner's awareness of the courtesy, consideration and patience accorded to him by the District Court and by the United States Court of Appeals for the Sixth Circuit, is petitioner's motion to recuse the district judge for personal bias and prejudice which petitioner filed

on July 16, 1955, one week after the District Court had entered the opinion referred to above, and the implied accusations of bias and prejudice upon the part of the circuit judges set forth at pages 13 and 14 of the petition for writ of certiorari.

VI.

QUESTIONS INVOLVED.

The "legal questions presented" set out by petitioner on page 3 of his petition for a writ of certiorari, are the same questions he presented to the United States Court of Appeals for the Sixth Circuit. They address themselves to the merits of his appeal and not to the question of whether certiorari should be granted. Inasmuch as the merits of petitioner's appeal are not now before this court these questions will not be dealt with here. We should like to call to the court's attention, however, that petitioner's framing of the issues on the merits is not deemed by the respondents to be an accurate one. Indeed, a different set of questions devoid of petitioner's colored prejudging conclusions was framed by the respondents before the Court of Appeals below.

VII.

THE REASONS RELIED UPON FOR DENIAL OF WRIT.

The respondents contend that the writ of certiorari should be denied for the following reasons:

1. The decision by the Court of Appeals for the Sixth Circuit affirming the order of the District Court is not in conflict with decisions of other United States Circuit Courts of Appeals or this Court. Any conflict claimed by petitioner is more apparent than real.

2. The decision of the United States Court of Appeals for the Sixth Circuit affirming the order of the District Court is not a departure from the accepted and usual course of judicial proceedings, and no review by this Court is necessary.

VIII.

ARGUMENT.

POINT 1. The Decision of the United States Court of Appeals for the Sixth Circuit Affirming the Order of the District Court Is Not in Conflict With Decisions of Other Circuits or of the Supreme Court.

Petitioner contends that the decision of the Court of Appeals for the Sixth Circuit in this case is in conflict with the following decisions:

First Circuit—*Cobb* v. *City of Malden,* 202 F. 2d 701 (March 13, 1953);

Second Circuit—*Burt* v. *City of New York,* 156 F. 2d 791 (June 26, 1946);

Third Circuit—*Picking* v. *Pennsylvania Railroad Co., Et Al.,* 151 F. 2d 240 (August 28, 1945);

Seventh Circuit—*Geach* v. *Moynahan,* 207 F. 2d 714 (November 9, 1953);

Supreme Court—*Bell* v. *Hood,* 327 U. S. 678 (April 1, 1946).

We shall discuss each case cited above for the purpose of pointing out that no real conflict exists in such decisions with the decision of the Court of Appeals in this case, with the single exception of the Picking case, which was decided prior to *Tenney* v. *Brandhove,* 341 U. S. 367, decided by this Court on May 21, 1951.

In *Cobb* v. *City of Malden, supra,* the action was by certain school teachers against the City of Malden, its mayor and its board of aldermen, charging conspiracy

to deprive them of Constitutional rights, impairment of contract, lack of due process and denial of equal protection. Salaries provided under contract were involved. The District Court dismissed for failure to state a claim. The First Circuit reversed on the ground that while the City was not liable for the tortious acts of its public officers, the plaintiffs did state a cause of action against the individual defendants since contract rights were impaired and the individual defendants were acting under color of law.

The factual situation in the *Cobb* case is not analogous to ours. The individual defendants in the *Cobb* case were not entitled to judicial immunity nor were they individuals acting *without* color of law.

In *Burt* v. *City of New York, supra,* the action was by an architect against the City of New York, its Board of Standards & Appeals, its Department of Housing & Buildings, its Commissioner of Buildings and other officials for denying the plaintiff's application through alleged purposeful discrimination. The District Court dismissed for lack of jurisdiction over the subject matter. The dismissal was clearly erroneous as the Court had jurisdiction under the Civil Rights Statutes. Moreover the factual situation is not analogous to our case as the defendants there were officers of a municipality charged with certain municipal functions and duties. They were not judicial officers entitled to judicial immunity nor were they individuals acting *without* color of law.

The only case cited by petitioner which has even an apparent conflict with our case and with other

decisions which support the decision in our case is that of *Picking* v. *Pennsylvania Railroad Co., et al., supra,* decided by the Third Circuit prior to this Court's decision in *Tenney* v. *Brandhove, supra,* and prior to the First Circuit's decision in *Francis* v. *Crafts,* 203 F. 2d 809 (April 22, 1953), which followed *Tenney* v. *Brandhove.* In the *Picking* case the plaintiffs were arrested in Pennsylvania, charged with placing advertisements on the flag of the United States. They were taken to New York for trial. The defendants in the Picking case included the Governors of New York and Pennsylvania, the District Attorney of New York, various policemen and peace officers, a Justice of the Peace and the Pennsylvania Railroad Company. The complaint alleged failure to comply with the Uniform Extradition Act and a conspiracy to subject the plaintiffs to false arrest and imprisonment and to deprive them of their rights guaranteed by the Fourteenth Amendment. The lower court sustained a motion to dismiss which was reversed by the Court of Appeals.

We believe the factual situation in the Picking case not analogous to the facts in our case. With the exception of the railroad company, all of the defendants were executive and administrative officers and law enforcement officers and a Justice of the Peace. There may be some question that a Justice of the Peace is entitled to the judicial immunity which protects judges of courts of general jurisdiction and judges of Courts of Appeal. At any rate the *Picking* case was decided, as was stated by the First Circuit in *Francis* v. *Crafts, supra,* before the illuminating

opinion of this Court in *Tenney* v. *Brandhove,* which held that the Civil Rights Statutes did not abrogate legislative immunity. Based on *Tenney* v. *Brandhove,* the First Circuit in *Francis* v. *Crafts,* held that the Civil Rights Statutes did not abrogate judicial immunity.

In each of the decisions of the various Circuit Courts of Appeals since *Tenney* v. *Brandhove* the courts have recognized the fact that the *Picking* case was decided before this Court's opinion in *Tenney* v. *Brandhove.* In addition to holding that *Picking* is bad law each of the Circuit Courts of Appeals have indicated that they did not believe that the Third Circuit would any longer follow its opinion in the *Picking* case in the light of *Tenney* v. *Brandhove.* This reasoning, which nullifies claims of apparent conflict between the decisions of the various Circuit Courts of Appeals and the *Picking* case, is supported by the subsequent history of decisions involving claims under the Civil Rights Statutes before the United States District Courts in Pennsylvania and the Third Circuit. In *United States of America* v. *Carson,* 126 F. Supp. 137 (D. C. Pa. 1954), and *Ginsburg* v. *Stern,* 125 F. Supp. 596 (D. C. Pa. 1954), the District Courts refused to follow the Third Circuit's opinion in the *Picking* case. In *Ginsburg* v. *Stern,* on appeal, 225 F. 2d 245 (3d Cir. 1955), the Third Circuit expressly refused the opportunity to pass upon the validity of its *Picking* decision in the light of *Tenney* v. *Brandhove.*

Since the decision in *Francis* v. *Crafts,* we have found no decision of a Circuit Court of Appeals, or of

this Court, which was in conflict therewith, where the defendants were either judicial officers entitled to judicial immunity or individuals acting entirely without color of law. This Court denied certiorari in the *Francis* case, 346 U. S: 835 (1953).

In *Geach* v. *Moynahan, supra,* the action was against four members of the Chicago Police Department for alleged deprivation of the civil rights of the plaintiff. Allegations of the complaint charged unlawful search and seizure, unlawful arrest and severe beating in an effort to extract a confession from him. The District Court dismissed the complaint for want of jurisdiction, and the Court of Appeals properly reversed for the reason that the allegations charged officials acting under color of law with depriving the plaintiff of his civil rights. The factual situation is in no way analogous to that in our case.

In *Bell* v. *Hood, supra,* the defendants were federal officers (F. B. I.) charged with depriving the plaintiff of civil rights in connection with his arrest and the search of his premises and seizure of his personal effects. The District Court dismissed for lack of jurisdiction on the ground that the case did not arise under the Constitution and the laws of the United States. Clearly it did, and the decision of this Court in reversing was proper. The factual situation is in no way analogous to that in our case.

POINT 2. The Decision of the United States Court of Appeals for the Sixth Circuit Affirming the Order of the District Court Is Not a Departure From the Accepted and Usual Course of Judicial Proceedings, and No Review by This Court Is Necessary.

Petitioner asserts that the Court of Appeals must have given scant consideration to his case. He predicates this conclusion upon what he describes as the "terse order" entered by the Court a few days after the oral argument heard in the case. While the order may be terse, it specifically states that the appeal was heard and duly considered upon the oral arguments and briefs of the appellant and of the attorneys for the several appellees and upon the record in the case. This is borne out by the statement made by Judge Martin, who presided at the hearing, that the Court had read briefs filed on behalf of all parties and was familiar with the record in the case.

The affirmance of the order of the District Court by the Court of Appeals, as stated in the order affirming, was based upon the well-considered and comprehensive opinion of the District Judge and upon the principles in the cases of *Kenney* v. *Fox, Kenney* v. *Hatfield* and *Kenney* v. *Killian,* decided by the same Court of Appeals on April 19, 1956 (232 F. 2d 288). These cases were relied upon by counsel for appellees in the argument of the appeal in this case.

The *Kenney* cases arose out of the commitment and confinement of the plaintiff in a mental hospital. The defendants in those three cases comprised a Circuit

Judge, a Probate Judge, an attorney, a superintendent and a physician of the State Hospital and a prosecuting attorney. The District Court dismissed the actions and the Court of Appeals affirmed, holding that judicial immunity had not been abrogated by the Civil Rights Statutes; that the prosecuting attorney was a *quasi*-judicial officer; that the private attorney was not acting under color of law and that the two institutional doctors could not go behind a court order of commitment which on its face appeared valid.

In the opinion in the *Kenney* cases the Court of Appeals relied upon *Bradley* v. *Fisher,* 80 U. S. 335 (1872), a leading decision of this Court on the principle of judicial immunity, *Tenney* v. *Brandhove, supra,* wherein this Court held that the Civil Rights Statutes did not abrogate the legislative immunity, and *Francis* v. *Crafts, supra,* the well-reasoned decision of the First Circuit, which followed the reasoning in *Tenney* v. *Brandhove* and distinguished the *Picking* case, *supra.* In the opinion in the *Kenney* cases the Court of Appeals rejected the holding in the *Picking* case.

In addition, the Court of Appeals for the Sixth Circuit also followed *Tate* v. *Arnold,* 223 F. 2d 782 (8th Cir. 1955), and *Cawley* v. *Warren,* 216 F. 2d 74 (7th Cir. 1954), which held judicial immunity has not been abrogated by the Civil Rights Statutes.

IX.

CONCLUSION.

In conclusion, we reiterate:

1. There are no real conflicts in the decisions respecting the application of judicial immunity to judicial and *quasi*-judicial officers who in the performance of their duties are not subject to suit by disgruntled litigants, and this immunity has not been abrogated by the Civil Rights Statutes;

2. Individuals not acting under color of law are not subject to damage suits under the Civil Rights Statutes; and

3. The Court of Appeals for the Sixth Circuit in affirming the District Court in this case did not depart from the accepted and usual course of judicial proceedings.

We respectfully urge this Court to deny certiorari in this case.

Respectfully submitted,

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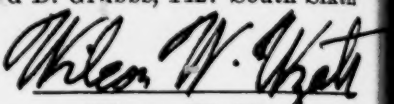
X.

CERTIFICATE OF SERVICE.

I, Wilson W. Wyatt, a member of the Bar of the Supreme Court of the United States, and one of the counsel for respondents herein, certify, pursuant to Rules 24 and 33(1)(3b) of the Rules of this Court, that on October 4, 1956, five copies of the foregoing brief were mailed postage prepaid to petitioner, Millard D. Grubbs, 1427 South Sixth St., Louisville, Ky.



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